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Ho Yee Onn v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO S-05(M)-331-06 OF 2018
MARY LIM, ZABARIAH YUSOF AND VAZEER ALAM JJCA
18 DECEMBER 2019

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Criminal Law — Dangerous Drugs Act 1952 — Double presumption — Appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the DDA read with s 34 of the Penal Code — High Court judge found that prima facie case proven based on presumptions under s 37(d) and (da) of the DDA — Whether learned judge erred in invoking double presumption

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the DDA read with s 34 of the Penal Code — High Court judge found that prima facie case proven based on presumptions under s 37(d) and (da) of the DDA — High Court judge held appellant failed to cast reasonable doubt on prosecution's case — Whether learned judge erred in invoking double presumption — Whether learned judge erred in making uncertain finding on possession and trafficking — Whether defence of innocent carrier proven — Whether charge ought to be reduced to one of lesser offence of possession

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The appellant was charged together with one Woo Kah Paul ('Woo'), still at large, with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the DDA read with s 34 of the Penal Code. The drugs were found in a plastic wrapped box ('P33') carried by the appellant at Kota Kinabalu International Airport. The learned judge found that the prosecution had proven prima facie case based on the presumptions under s 37(d) and (da) of the DDA. At the end of the trial, the learned judge found the appellant guilty as charged and consequently the appellant was sentenced to death. Aggrieved by the decision, the appellant filed the present appeal. The appellant submitted, inter alia, that the learned judge erred in invoking double presumption and in making uncertain finding on the elements of possession and trafficking. Further, the appellant submitted that the learned judge erred when Her Ladyship did not make a finding at the end of the prosecution case on whether the appellant had common intention with Woo to traffic the drugs. At the hearing of the present appeal, the prosecution conceded that the learned judge's decision was erroneous, unsafe and ought to

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be set aside in view of the invocation of double presumption. However, the prosecution urged the court to reduce the charge to one of a lesser offence of possession under s 39A(2) of the DDA ('the alternative charge') and to find the appellant guilty on this lesser charge.

Held, allowing the appeal, setting aside the decision of the High Court and acquitting and discharging the appellant:

- (1) The learned judge had invoked both presumptions under s 37(d) and (da) of the DDA. The Federal Court's decision in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 applied to the present appeal and the concession of the prosecution supported this conclusion. Based on the Federal Court's decision, invocation of double presumptions was unconstitutional, hence, the charge of trafficking in the present appeal cannot stand (see paras 40 & 54).
- (2) The learned judge had made inconsistent findings on possession and trafficking, using the terms interchangeably to the prejudice of the appellant. The law required the trial judge to make definitive and certain findings on the element of possession and trafficking at the end of prosecution case as this would impact the evidential burden that had to be discharged by the appellant at the end of the trial (see para 41).
- (3) With regards to the alternative charge, the learned judge had failed to consider the defence of innocent carrier and this failure had caused miscarriage of justice. Further, the learned judge failed to consider this vital factor; that the presence of a third person other than the appellant was simply not verified; and this was highly relevant to the defence of innocent carrier as relied on by the appellant. Had these pieces of evidence been considered and evaluated, Her Ladyship would have found the appellant's defence both credible and probable. On the totality of evidence, the defence of innocent carrier had been successfully established on the facts and law by the appellant thus not only rebutting the presumption under s 37(d) of the DDA relied on by the prosecution but successfully demolished the prosecution's case (see paras 42, 43, 49 & 55).
- (4) The prosecution's real contention was that the name of Woo was given belatedly, that there was delayed disclosure. In the Federal Court decision of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46, there was a five-day delay in disclosing the real identity of 'Ho Seng' to the police, and even then, the existence of 'Ho Seng' was challenged. That was entirely different from the present appeal where not only Woo existed, that fact was admitted by the prosecution; the evidence led by the prosecution showed that P33 was checked in by Woo; that the luggage tag belonged to Woo; that the appellant did not check in any luggage himself; that the appellant was seen on his hand phone prior to

- A approaching carousel D to retrieve P33; that the appellant had informed the customs officers at first and every opportunity as to the ownership and existence of Woo (see para 53).

[Bahasa Malaysia summary]

- B Perayu didakwa bersama-sama dengan seorang yang bernama Woo Kah Paul ('Woo'), yang masih bebas, dengan kesalahan pengedaran dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum di bawah s 39B(2) ADB dibaca dengan s 34 Kanun Keseksaan. Dadah tersebut ditemui di dalam kotak yang dibungkus dengan plastik ('P33') yang dibawa oleh perayu di Lapangan Terbang Antarabangsa Kota Kinabalu. Hakim yang C bijaksana mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie berdasarkan andaian di bawah s 37(d) dan (da) ADB. Di akhir perbicaraan, hakim yang bijaksana mendapati perayu bersalah seperti yang didakwa dan akibatnya perayu dijatuhkan hukuman mati. Terkilan dengan D keputusan tersebut, perayu memfailkan rayuan semasa. Perayu berhujah, antara lain, bahawa hakim yang bijaksana terkhilaf apabila menggunakan anggapan berganda dan membuat keputusan yang tidak menentu mengenai unsur-unsur pemilikan dan pengedaran. Selanjutnya, perayu berhujah bahawa hakim yang bijaksana terkhilaf apabila gagal membuat keputusan di akhir kes E pendakwaan sama ada perayu mempunyai niat bersama dengan Woo untuk mengedar dadah. Pada persidangan rayuan semasa, pihak pendakwaan mengakui bahawa keputusan hakim bicara adalah salah, tidak selamat dan harus diketepikan di atas penggunaan andaian berganda tersebut. Walau bagaimanapun, pihak pendakwaan menggesa mahkamah untuk F mengurangkan tuduhan tersebut kepada kesalahan yang lebih rendah iaitu kesalahan pemilikan di bawah s 39A(2) ADB ('pertuduhan alternatif') dan mensabitkan perayu bersalah atas tuduhan yang lebih rendah tersebut.

- G **Diputuskan**, membenarkan rayuan, mengenenpikan keputusan Mahkamah Tinggi dan melepas dan membebaskan perayu:

- (1) Hakim yang bijaksana menggunakan kedua-dua anggapan di bawah s 37(d) dan (da) ADB. Keputusan Mahkamah Persekutuan dalam *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 adalah terpakai di dalam rayuan semasa dan konsesi pihak pendakwaan menyokong kesimpulan ini. Berdasarkan keputusan Mahkamah Persekutuan tersebut, andaian berganda adalah tidak berpelembagaan, oleh itu, pertuduhan pengedaran dalam rayuan semasa gagal dibuktikan (lihat perenggan 40 & 54).
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- I (2) Hakim yang bijaksana telah membuat dapatan yang tidak konsisten mengenai pemilikan dan pengedaran, menggunakan istilah-istilah tersebut secara bertukar ganti yang menyebabkan prejudis terhadap perayu. Undang-undang menghendaki hakim bicara untuk membuat dapatan yang pasti dan tetap mengenai elemen pemilikan dan

- pengedaran di akhir kes pendakwaan kerana ini akan memberi kesan kepada beban pembuktian yang harus dilepaskan oleh perayu di akhir perbicaraan (lihat perenggan 41). A
- (3) Berkaitan dengan pertuduhan alternatif, hakim yang bijaksana telah gagal mempertimbangkan pembelaan ‘innocent carrier’ dan kegagalan ini menyebabkan kegagalan keadilan. Selanjutnya, hakim yang bijaksana gagal mempertimbangkan faktor penting ini; bahawa kehadiran orang ketiga selain perayu tidak disahkan; dan ini amat relevan terhadap pembelaan ‘innocent carrier’ seperti yang diujahkan oleh perayu. Sekiranya keterangan-keterangan tersebut telah dipertimbangkan dan dinilai, hakim bicara akan mendapati pembelaan perayu boleh dipercayai dan berkemungkinan. Berdasarkan keseluruhan keterangan, pembelaan ‘innocent carrier’ telah berjaya dibuktikan pada fakta dan undang-undang oleh perayu dengan itu bukan sahaja menyangkal anggapan di bawah s 37(d) ADB yang diujahkan oleh pihak pendakwaan tetapi juga berjaya menghancurkan kes pendakwaan (lihat perenggan 42, 43, 49 & 55). B C D
- (4) Hujahan utama pihak pendakwaan adalah bahawa nama Woo telah diberikan secara lambat, bahawa terdapat penangguhan pendedahan. Dalam keputusan Mahkamah Persekutuan *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46, terdapat kelewatan lima hari dalam mendedahkan identiti sebenar ‘Ho Seng’ kepada polis, dan dalam kes tersebut juga, kewujudan ‘Ho Seng’ dicabar. Itu sama sekali berbeza dari rayuan semasa dimana bukan sahaja Woo wujud, fakta tersebut telah diterima oleh pihak pendakwaan; keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa P33 telah diperiksa oleh Woo; bahawa tag bagasi milik Woo; bahawa perayu tidak mendaftar masuk apa-apa bagasi miliknya sendiri; bahawa perayu dilihat sedang menggunakan telefon bimbitnya sebelum mendekati carousel D untuk mendapatkan P33; bahawa perayu telah memberitahu pegawai kastam di awal dan di setiap kesempatan yang ada mengenai pemilikan dan kewujudan Woo (lihat perenggan 53). E F G

Cases referred to

- Muhammed bin Hassan v PP* [1998] 2 MLJ 273, FC (refd) H
- Alma Nudo Atenza v PP and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)
- Felix King (w/n Sierra Leone) v PP* [2019] 1 MLJ 243, CA (refd)
- Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385, FC (refd) I
- Munuswamy Sundar Raj v PP* [2015] 6 MLJ 214, FC (refd)
- Pendakwa Raya v Herlina Purnama Puri* [2016] MLJU 1824, CA (refd)
- PP v Dato Yap Peng* [1987] 2 MLJ 311, SC (refd)

- A** *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22, CA (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408, CA (refd)
Soorya Kumar all Narayanan & Anor v PP [2013] 1 MLJ 1, FC (refd)
- B** *Teng Howe Sing v PP* [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal [2019] 4 MLJ 581; [2019] 7 CLJ 715, FC (refd)
- C** **Legislation referred to**
 Criminal Procedure Code s 259
 Dangerous Drugs Act 1952 ss 37(d), (da), 37A, 39B(1)(a), (2)
- D** **Appeal from:** Criminal Trial No BKI-45A-5/11 of 2016 (High Court, Kota Kinabalu)
Hamid Ismail (Hamid & Co) for the appellant.
Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

E **Mary Lim JCA:**

INTRODUCTION

- F** [1] The appellant was charged together with another person named Woo Kah Paul, still at large, with the offence of trafficking in dangerous drugs in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), punishable under s 39B(2) of the Act read with s 34 of the Penal Code. The learned judge called for defence on the charge preferred against the appellant at the end of the prosecution case. At the end of trial, the learned Judge found the appellant guilty as charged, and proceeded to convict and sentence the appellant to the mandatory death penalty. Aggrieved with both the conviction and sentence, the appellant appealed.
- G**
- H** [2] Upon hearing and after carefully considering the oral and written submissions of both learned counsel against the reasons for decision of Her Ladyship and the records of appeal, we, unanimously allowed the appeal. We found the conviction unsafe, be it under the original charge under s 39B(1)(a) of the Act or the alternative charge of possession under s 39A(2) of the same offered by the learned DPP. Consequently, we allowed the appeal, set aside the decision of the High Court together with the conviction and sentence, and, acquitted and discharged the appellant.
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[3] These are our full reasons for the decision.

CHARGE

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[4] The charge against the appellant reads as follows:

Bahawa kamu bersama-sama dengan Woo Kah Paul No K/P: 960110-14-6325 yang masih lagi bebas pada 21 Mei 2016 jam lebih kurang 03:40 petang di Balai Ketibaan 2, Terminal Lapangan Terbang Antarabangsa Kota Kinabalu, di dalam Daerah Kota Kinabalu, di dalam Negeri Sabah, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 4396.7 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

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THE PROSECUTION'S CASE

[5] On 21 May 2016, Penguasa Kastam Puan Nurul Farhana bt Rusla ('PW6') together with her officers were carrying out observation and examination duties at the Arrival Hall of Terminal 2 at Kota Kinabalu International Airport ('KKIA') from 1400 hours to 2200 hours. The appellant landed at KKIA from Kuala Lumpur via flight AK5112. As the appellant stepped out of the escalator at the baggage reclaim area, he stopped and stood focusing his sight at the baggage security clearance area ('BSCA').

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[6] PW1, a customs officer who was on duty observed the appellant and found the appellant's behavior wanting/suspicious. PW1 trailed the appellant who then proceeded towards the toilet, made a phone call and entered the toilet cubicle. After exiting the toilet cubicle, the appellant walked out of the toilet heading straight towards carousel D and reclaimed a plastic wrapped box ('P33') from the carousel. PW1 continued to trail the appellant.

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[7] PW1 next saw the appellant after picking up P33, placing P33 on the floor and checking the tag affixed to P33 against a boarding pass ('P7') that he was holding in his other hand. Subsequently, the appellant placed P33 on a trolley and strode towards the BSCA. PW1 observed the appellant queuing in line anxiously focusing his sight at the security clearance procedure.

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[8] PW1 then notified his colleagues PW2 and PW3 to be heedful of the appellant and P33 during scanning. At that time, PW2 and PW3 were supervising another customs officer who was manning the screening machine counter. As P33 was being scanned, PW1 saw PW2 directed the appellant to bring P33 to another counter, and there to open P33. PW1 saw the appellant ploddingly and hesitantly unwrapped the plastic from P33.

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[9] According to PW1, PW3 later escorted the appellant back to carousel D, supposedly to retrieve his box. None were found even after all the passengers

- A from the same flight had reclaimed their respective baggage, luggage and/or boxes. PW1 saw PW3 next directed the appellant together with P33 and his personal bags to the CCP Office. PW1 followed from behind and later returned to his normal duties.
- B [10] PW2 who was on duty with PW3 testified that aside from supervising another customs officer who was manning the scanning machine counter, his duty as a 'User' on 21 May 2016 at about 3.30pm was to direct passengers to go forward to the scanner machine counter. As P33 made its way through the scanning machine, PW2 saw a suspicious image inside P33 displayed on the scanning monitor. Minding PW1's earlier remarks, PW2 then directed the
- C appellant to bring P33 along with him to the examining counter on the opposite side to the scanning machine counter.
- D [11] At the examination counter, PW2 directed the appellant to unwrap the plastic from the box. PW2 gave the appellant a small knife to open P33. According to PW2, the appellant looked anxious when directed to open the plastic from the box, and while he was opening P33 with the knife given, his hands were shivering.
- E [12] These were found inside P33 when opened — there were two packets of 'Snek Mi'. Upon taking out these two packets, PW2 saw there were several other packets six wrapped in newspaper inside P33. Although instructed, the appellant refused to unwrap the newspaper packing, explaining that P33 was
- F not his.
- G [13] Following the appellant's refusal, PW2 requested for the appellant's boarding pass and the luggage tag which was affixed to P33. Upon checking, the boarding pass proved to be registered under the appellant's name while P33 was of a different name. PW2 then handed the matter over to his colleague, Azamaain bin Kenit ('PW3').
- H [14] PW3 then queried the appellant as to why he took P33 knowing that it did not belong to him. The appellant's reply was that P33 looked similar to his box and said that his box could possibly be at the conveyor belt. PW3 then escorted the appellant to carousel D to check but none was found. Following that, PW3 directed the appellant to pick up P33 and the rest of his belongings and escorted the appellant to the CPP's office for further action.
- I [15] Inside the CPP's office, PW3 instructed the appellant to sit on the sofa and to place P33 together with his bags beside the sofa. PW3 then informed PW6, his supervisor on the matter. PW6 informed the same to Ketua Cawangan Kastam KKIA. PW6 inspected the contents of P33 and instructed two officers, Salestine Sujah and Connie Chew to assist her. Inside P33, there

were several packages six wrapped in newspaper. PW6 instructed Salestine to unwrap one of the packets. Upon unwrapping, PW6 found one 'Guanyinwang' tea plastic and inside it to contain another transparent plastic containing clear crystal substance. Using the Trunarc device, Salestine tested the clear crystal substance and found it to be methamphetamine.

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[16] After the appellant was cautioned, the appellant replied that P33 did not belong to him but to his friend Woo Kah Paul who according to the appellant was outside the arrival hall. PW6 later confirmed that the luggage tag affixed to P33 was in Woo Kah Paul's name.

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[17] A body search was conducted and no incriminating material was found on the appellant. Subsequently, P33 was repacked, covered and sealed. The appellant and the seized goods were brought to Wisma Kastam, Kota Kinabalu and on arrival at 6.25pm at the meeting operation room there, the necessary paper work was processed including the requisite receipts and documents, photograph taking and the labelling of the seized items and the weighing of the subject matter. The appellant was in the meanwhile observed to be silent and looking nervous with a pale face. PW3 remained with the appellant till the arrival of the Narcotics officers called by PW6.

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[18] Thereafter, PW6 handed over the appellant and the seized items to PW7, the investigating officer for further investigation.

[19] PW7 testified as follows. According to PW7, earlier in the evening of 21 May 2016, his Penolong Kanan Pengarah Kastam II, Bahagian Siasatan instructed him to be on stand-by at his office to receive a drugs related case from KKIA. It was only about 12.30am of 22 May 2016 when he eventually received the handing over from PW6. He placed the seized items inside his steel cabinet in his office. He had the sole custody of the key to the steel cabinet. He then instructed the appellant to be placed at the lock-up at Balai Police Kepyang. The next day, he brought the appellant to court for further remand under s 259 of the Criminal Procedure Code.

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[20] He then prepared the necessary documentation and conducted investigations as summarised below:

23 May 2016

the appellant was brought to Wisma Kastam and the Forensics team came to Cawangan Siasatan, Kota Kinabalu to process the 'finger dusting lifting on the exhibits seized. Fingerprint was found on the plastic packet branded 'GUANYINWANG' marked A3(a) & A4(a) and on the packet of 'snek mi' but the result proved negative due to lacking in property (character).

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- A** 26 May 2016 exhibits P9, P12, P15, P18, P21 & P24 were placed inside a box labelled 'F' [P8] and sent to PW5 at the Chemistry Department for drug analysis. A receipt [P37] was received. The result proved positive containing 4396.7 grams of Methamphetamine. PW4 conducted the analysis and the chemist report [P28] dated 29.9.2016 was tendered at trial. The sending and receiving of P33 was without incident, they were said to be sealed by the respective departments and were intact.
- B**
- 26 May 2016 at about 4.33pm an envelope labelled 'H' and a box labelled 'G' [P54] were sent to Pegawai Sains at the Chemistry Department for DNA analysis. P54 and the DNA report [P53] were received on 12.10.2016.
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All exhibits were later sent to 'Stor Bahagian Penguatkuasaan, Sepanggar' and taken out by PW7 to be brought to court.

- D** [21] These were P7's investigations into the character of Woo Kah Paul ('Woo') and the role he played in the instant case:
- E** (a) upon checking the manifest as well as the baggage list with Air Asia AK5112, PW7 found that such a person existed. Woo however did not make any claim for P33 at the Lost & Found counter;
- F** (b) on 22 May 2016, PW7 sought the assistance of Jabatan Imigresen Malaysia to assist by obstructing Woo from leaving Sabah, and to obtain details of his movement in and out of Sabah. Jabatan Imigresen responded with the information that there was no record of Woo leaving or exiting Sabah since the last time he landed in Sabah, that is, on 21 May 2016;
- G** (c) PW7 applied to Malaysia Airports Bhd ('MAB') for a copy of the CCTV recording on 21 May 2016 at both KKIA and KLIA, T2;
- (d) PW7 also applied to Cyber Security Malaysia to analyse the appellant's mobile phone for any information that may assist in the investigations. This proved negative; and
- H** (e) PW7 also applied to Jabatan Pendaftaran Negara for Woo's status and latest address. The department's reply ('P56') revealed an address at Taman Orkid, Cheras, Selangor which upon investigation was found to be a non-existent address.

I FINDINGS OF THE TRIAL COURT

[22] At the end of the prosecution's case, the learned trial judge applied the law on double presumption under s 37A, that both s 37(d) and (da) of the Dangerous Drugs Act 1952 may be relied on by the prosecution. However,

before the two presumptions may be triggered, the prosecution had to adduce ‘concrete facts’ and prove its case beyond reasonable doubt that the appellant had custody and control of the drugs in question.

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[23] On the ‘concrete facts’ adduced by the prosecution, the learned judge invoked the presumption under s 37(d) of the Act — that the appellant is deemed to have in his possession the impugned drugs and to have known the nature of such drugs until the contrary is proven after accepting the following evidence.

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[24] First, the learned judge accepted the evidence of the chemist (‘PW4’) and found the evidence not inherently incredible, that the drugs seized was the type, nature and weight as testified by PW4 and as set out in his report (P28).

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[25] As for the element of possession, the learned judge held that the prosecution was entitled to rely on the presumption of possession and knowledge under s 37(d) of the Act, that the prosecution need only establish positive evidence that the appellant had custody and control over P33 at the material time. Therefore, it was presumed that the appellant was in possession of the impugned drugs P9, P12, P15, P18, P21 and P24 (transparent packet containing crystalline substance labelled A3(b)–A8(b) and that the appellant knew the nature of the impugned drugs contained inside those exhibits.

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[26] The learned judge found that the appellant had direct custody and control over P33 at the material time because:

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- (a) the appellant was alone from the time he stepped onto the escalator at the baggage reclaim area till the time he was stopped by PW2;
- (b) PW1 had observed the appellant picking up P33 from carousel D, placing P33 on the floor, checking and comparing the luggage tag (P47) of P33 with the cut portion of the boarding pass (P7) that he held in his hand; placing P33 thereafter on a trolley and proceeding to walk and push the trolley towards the security clearance area; and
- (c) that the appellant’s response of having taken P33 mistakenly as it looked similar to his was not truthful in view of PW1’s observations as stated above.

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[27] On the matter of knowledge, the learned judge found from the facts coupled with the behavior of the appellant as described by the prosecution witnesses implied that the appellant had knowledge of the presence of P9, P12, P15, P18, P21 and P24 (transparent packet containing crystalline substance labelled A3(b)–A8(b) found inside P33. The inference was imported as the appellant had no reason to go to carousel D since he did not check in any

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- A luggage; yet, he did the same thus inferring that P33 belonged to him. The appellant had conveniently changed his story to one about P33 belonging to Woo and hiding behind the defence of ‘innocent carrier’ when his modus was found out.
- B [28] Her Ladyship was of the view that the appellant had devised a clever scheme and modus to evade detection and to exculpate himself should he be found out. According to the learned judge, the appellant had no reason to go through the charade of checking P46 against P7 when he already knew that the two did not match. Lastly, Her Ladyship noted that the appellant’s conduct was
- C suspicious as testified by PW2, that the appellant looked nervous and that his hands were shivering when he was asked to open P33; that the appellant sat silently with a pale face when he was taken to the CPP’s office.
- D [29] The learned judge went on to further presume that the appellant is trafficking under s 37(da) of the Act in the light of the weight of the drugs recovered from the appellant, and because the drugs were packed in such a way to avoid detection by placing the drugs inside a tea packet as if the package contained tea produce. Consequently, the learned judge found that the
- E prosecution had proven a prima facie case against the appellant as per the charge and that the presumptions had not been rebutted. The appellant was then ordered to enter his defence on the charge preferred against him.

THE DEFENCE CASE

- F [30] In essence, the appellant’s defence is that P33 did not belong to him but to Woo. The appellant first met Woo 3 to 4 months earlier when Woo came to Kuala Lumpur looking for car accessories. The appellant himself who hails from Miri, Sarawak was working as a mechanic before his arrest. Woo had told
- G the appellant that he worked as a car accessories fitter. The day before he left for Kota Kinabalu, he mentioned to Woo that he was leaving for Kota Kinabalu and Woo decided to follow him without telling him why. The appellant was in Kota Kinabalu looking for car accessories upon his father’s request; his father wanted him to look for Isuzu engine spare parts to be sent to Sarawak.
- H [31] Although both of them did not check in or went through the immigration counter together, they sat next to each other on the flight. The appellant claimed that they did not have any conversation with each other as he slept throughout the flight. As for luggage, he did not check in any. However,
- I when he was on the way out of KKIA, he had stopped and had entered the toilet when he received a call from Woo. Woo told him that he had forgotten to reclaim his box (‘P33’) at the conveyor belt and Woo had asked him for a favour to pick up the same for him. Woo told him that he could not return to the ‘reclaim baggage area’ because he had already come out of the arrival exit and

that he would not be allowed to re-enter. Woo described the box to him and had told him that the box contained dried meat.

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[32] And, so, when the customs officer had asked him about the contents of P33, he had replied that it contained 'eatery items' and had thus agreed to open the box with the knife provided by the customs officer when asked to by the officer. According to him, the luggage tag was still attached to the box ('P33') when he carried it to the scanner machine.

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[33] As for the contents of P33 when P33 was opened, the appellant claimed that he had informed the customs officer that he wanted to call Woo. Instead of allowing him to do so, the customs officer grabbed and seized his hand phone. He had also informed the officer that Woo was outside the arrival hall, waiting for him. This was also ignored and the officer did not go out to look for Woo.

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FINDINGS OF THE TRIAL JUDGE

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[34] At the conclusion of trial, the learned judge found the prosecution witnesses to be honest and credible who had withstood vigorous cross-examination by a very experienced and competent counsel; that they were members of law enforcement agencies who did not know the appellant or bear ill-will towards him, and that they were merely discharging their duties. By comparison, the learned judge found the defence to 'be highly improbable' for the following reasons:

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28.1 Although Woo was not a fictitious character, the court found:

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- (a) the appellant 'giving mixed signal as to their relationship'; and that the appellant was 'coy about his relationship with Woo so as to delude the authorities to conclude that they formed common intention to traffic the subject matter in this case'; and
- (b) that in actual fact, both Woo and the appellant had intentionally planned the sequences of the incident (as disclosed at the prima facie stage) so as to fool the authorities but for the unsuspecting 'rover' (PW1) and non-fool proof of their plan.

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[35] The learned judge thus found that the defence had failed to rebut the presumption on a balance of probabilities and to raise a reasonable doubt on the prosecution case. The appellant was thus convicted and sentenced to death; hence this appeal.

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THE APPEAL

[36] Learned counsel for the appellant canvassed five grounds of appeal before us:

- A (a) that the learned judge had breached the double presumption rule whereby she had invoked both presumptions under s 37(d) and (da) of the Dangerous Drugs Act 1952 to hold at the end of the prosecution case that the appellant had possession and was trafficking in the drugs;
- B (b) that the learned judge had misdirected herself when she made uncertain findings on the elements of possession and trafficking thereby prejudicing the appellant;
- C (c) that the learned judge had erred in law and in fact in respect of the element of common intention when Her Ladyship did not make a finding at the end of the prosecution case on whether the appellant had common intention with Woo to traffic the drugs; and when there was no evidence of common intention adduced by the prosecution at the end of the prosecution case;
- D (d) that the learned judge had misdirected herself when she failed to consider and appreciate the appellant's defence at the end of the trial according to trite law; and
- E (e) that the learned judge had misdirected herself when she failed to consider at the end of the trial as to whether the appellant had rebutted the presumption of possession under s 37(d) of the Act or alternatively the presumption of trafficking under s 37(da) of the Act.
- F [37] The Federal Court recently in the decision of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 declared that s 37A of the Dangerous Drugs Act 1952 to be unconstitutional. In their written submissions, learned DPP contended that the Federal Court's decision has no application since the High Court decision under consideration was decided before the Federal Court rendered its decision. At the hearing of this appeal, learned DPP conceded that the decision of the learned judge that the appellant was guilty as charged was therefore erroneous, unsafe and ought to be set aside, in view of the invocation of double presumption against the appellant under s 37(d) and (da) of the Act.
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- H [38] However, the learned DPP urged this court to reduce the charge to one of a lesser offence of possession under s 39A(2) of the Act, to find the appellant guilty on this lesser charge and to sentence him to a term of imprisonment between 20 to 25 years in view of the weight of the drugs. Learned DPP relied now on the single presumption under s 37(d) as laid down in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273.
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[39] We declined.

[40] First, on the matter of the Federal Court decision in *Alma Nudo Atenza*

v Public Prosecutor and another appeal. The learned judge had indeed invoked both presumptions under s 37(d) and (da) of the Act. We are of the firm view that the Federal Court decision applies to the present appeal and the concession of the learned DPP supports this conclusion. We are obliged to apply the law as it stands and as decided by the apex court; it is not a matter of retrospective effect but an application of the law as it stands to all pending proceedings. The instant appeal remains a pending proceeding for so long as it is still processing through the appellate process and is thus subject to the rigours of, inter alia, the doctrine of stare decisis and the principle of prospective overruling (see *Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal* [2019] 4 MLJ 581; [2019] 7 CLJ 715; *Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385; *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311). On this ground alone, the appeal must be allowed and the conviction and sentence be set aside.

[41] We add that the learned judge had erred in the deployment of the terms ‘actual possession’, ‘carrying’ and ‘transporting’ in the manner as submitted by learned counsel for the appellant thereby causing prejudice to the appellant. The learned judge had made inconsistent findings on possession and trafficking, using the terms interchangeably to the prejudice of the appellant. The law requires the trial judge to make definitive and certain findings on the element of possession and trafficking at the end of prosecution case (see *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22; *Felix King (w/n Sierra Leone) v Public Prosecutor* [2019] 1 MLJ 243) as this impacts on the evidential burden that has to be discharged by the appellant at the end of the trial.

[42] As for the alternative charge, we are obliged to nevertheless consider the defence of innocent carrier in the facts and circumstances as relied on by the appellant. Having done so, we unanimously, found from the totality of evidence that the defence of innocent carrier had been successfully established on the facts and law by the appellant thus not only rebutting the presumption under s 37(d) relied on by the prosecution but successfully demolished the prosecution’s case. Under the circumstances, not only is the conviction of the appellant under the original charge unsafe, so would be the alternative charge now urged upon us by the prosecution. These are our reasons.

[43] In our mind is the role played by Woo, a matter which is directly related and relevant to the defence of innocent carrier. Having considered the reasons of the learned judge, we find that the learned judge had in fact failed to deal with this defence at the end of trial, as she was required in law to do. All that the learned judge did was to disbelieve the appellant, suspecting that the appellant

- A was hiding his real relationship with Woo. Having called for the appellant's defence, it was the trial judge's duty to evaluate that defence of innocent carrier to see if there was in fact evidence to support that defence. What the learned judge did instead was to focus on the issue of common intention to the exclusion of consideration of this defence. We find that the learned judge had
- B erroneously failed in that regard occasioning thereby a miscarriage of justice which we are obliged to put right.

- C [44] The defence of 'innocent carrier' was explained in *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214 by the Federal Court in the following terms:

- D A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example, a bag or a box as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.

- E [45] Since the defence was that he was an innocent carrier, the learned judge was obliged to consider the issue of deliberate action and whether there was wilful blindness — see *Pendakwa Raya v Herlina Purnama Puri* [2016] MLJU 1824. In the present appeal, the learned judge was required to consider whether the appellant was truly innocent or was he being wilfully blind to the realities around him. This defence of innocent carrier refers to a state of affairs or a set of factual circumstances where the appellant acknowledges that he was carrying P33 or has explained how he has come to be carrying P33, but has denied
- F knowledge of the drugs found in P33. In the present appeal, the learned judge was required to examine the full circumstances to see if the defence has been borne out by the evidence led and relied on by both the prosecution and the appellant, and that the appellant had not been willfully blind. The amount of drugs recovered does not ipso facto deprive the appellant of this defence — see
- G the Federal Court decision in *Soorya Kumar a/l Narayanan & Anor v Public Prosecutor* [2013] 1 MLJ 1.

- H [46] Given that the existence of Woo is not in doubt, that the prosecution had accepted that this individual exists, and that from their inquiries Woo is still in Sabah or rather has not left Sabah, it must surely mean that Woo traveled with the appellant as claimed by the appellant. Since Woo was on the same flight as the appellant, this must also mean that he had landed in KKIA as did the appellant, and had traversed the same areas of KKIA as the appellant, save that he did not pick up his box (P33) which he had checked in at KLIA2, and
- I which according to the appellant, Woo had sought his favour to pick up for him for the reasons relied on by the appellant.

[47] The evidence shows that the appellant had made known the existence of Woo at the earliest opportunity and had done so repeatedly. He had Woo's

hand phone number on his own handphone and had requested to call Woo, which was refused. No explanation was proffered for this refusal. He had not only informed PW2 but also PW6 that P33 belonged to Woo and that Woo was waiting outside at the arrival hall for P33. The appellant had further described Woo, explaining that he was wearing a black long sleeved T-shirt with the number 9 on the right shoulder. Despite being told, none of the Customs officers checked out the appellant's explanation, especially to look for Woo. This is confirmed by the evidence of PW2, PW6 (see pp 50—54 and 56–57 in the records of appeal).

[48] The appellant's flight landed at 3.40pm in the afternoon and it was not until 6.25pm that the appellant was brought to Wisma Kastam, Kota Kinabalu and at 12.30am that the investigations were handed over to PW7. The time lapse and the multiple occasions where the appellant raised the matter of Woo clearly indicate that the customs officers were aware very early on of the existence of Woo and had ample opportunity to verify the appellant's claim, yet failed to do so with no explanation or reasonable explanation given. In fact, this trail of relevant evidence was not investigated till some four months later (see pp 144–173 of the record of appeal), long after it had gone quite cold. Thus, learned DPP's submission that the appellant had only raised the matter of Woo somewhat late is, as we can see, quite clearly not supported at all by the evidence; that it was the ineptness of the investigation that is belated and wanting, and for which the appellant cannot be blamed, worse to be found guilty as charged.

[49] The learned judge failed to consider this vital factor; that the presence of a third person other than the appellant was simply not verified; and this is highly relevant to the defence of innocent carrier as relied on by the appellant. Had these pieces of evidence been considered and evaluated as we have now done, Her Ladyship would have found the appellant's defence both credible and probable. Although the prosecution witnesses had each recounted the events on that fateful afternoon, none of them explained or could explain why they did not look for Woo, especially when the details on the luggage tag (P47) and the boarding pass (P7) did not match.

[50] Further, the learned judge had clearly misunderstood the reason why the appellant was checking P47 against P7 and why he was escorted back to carousel D by PW3. The learned judge was of the view that there was no logical reason for the appellant to go to carousel D to take P33 since he did not check in any luggage. Despite knowing that, the appellant consciously went to carousel D to retrieve P33. According to the learned judge, the appellant's 'action of purposely checking P47 against P7 was to give impression to any observing customs officer that the said P33 belongs to him'.

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A [51] The very defence of the appellant was that he was asked to retrieve P33 by Woo, and Woo had called him after he had left the security clearance area. The existence of this phone conversation is actually confirmed by PW1. The explanation offered by the appellant as to why he was checking P47 against P7; B that it was to confirm the flight details are plausible and reasonable. As for going back to carousel D, the appellant had explained that it was to check if there was any other box belonging to Woo, not to check for a box belonging to him since he did not check in any. Since this (P33) was the only box bearing Woo's details, this was indeed Woo's box. This was confirmed by PW3 — see C p 64 of the record of appeal.

D [52] As for P33 itself, the prosecution had led evidence that the appellant did not check in any luggage. Hence, P33 was not checked in by the appellant. It was checked in by Woo as was shown by the manifest. P33 at the very least, belonged to Woo. The issue then is whether the appellant was aware of the contents of P33 or had knowledge of the drugs seized, the very material question that the learned judge was required in law to resolve. For the same reasons as set out above, we find that the appellant cannot be said to have been wilfully blind as to the obvious and to the contents of P33. His explanation is E supported by the evidence led, and the learned judge's conclusion that the appellant had devised a clever scheme and modus to evade detection and to exculpate himself should he be found out are speculations at best, not supported by any evidence. Even on the matter of common intention, we do not find that proved, and learned DPP is not in any case, urging that upon us F in this alternative charge.

G [53] At the hearing of this appeal, as pointed out earlier, learned DPP's real contention is that the name of Woo was given belatedly, that there was delayed disclosure. In the Federal Court decision of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, there was a five day delay in disclosing the real identity of 'Ho Seng' to the police, and even then, the existence of 'Ho Seng' was challenged. That is entirely different from our instant appeal where not only does Woo exist, that fact is admitted by the prosecution; the evidence led by the prosecution show that P33 was checked in by Woo; that the luggage H tag belonged to Woo; that the appellant did not check in any luggage himself; that the appellant was seen on his hand phone prior to approaching carousel D to retrieve P33; that the appellant had informed the customs officers at first and every opportunity as to the ownership and existence of Woo.

I CONCLUSION

[54] For all the reasons set out above and having considered the submissions of learned counsel for the appellant and learned DPP, and having taken on board the concession by the learned DPP that there was an application and

reliance on the double presumption by the learned judge, and following the recent decision of the Federal Court in *Alma Nudo*, such invocation being unconstitutional, the charge of trafficking cannot stand.

[55] As for the alternative charge under s 39A(2) of the Act, we find that the defence of innocent carrier made out by the appellant both on the facts and in law. Consequently, the appeal is allowed and the decision of the High Court is set aside together with the conviction and sentence imposed by the High Court. The appellant is accordingly acquitted and discharged.

Appeal allowed; decision of High Court set aside; appellant discharged and acquitted.

Reported by Dzulqarnain Ab Fatar

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